

Testimony of Lori Wallach
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*Permanent NTR for China:
Neither Merited nor Necessary*

Mr. Chairman and members of the committee, on behalf of Public Citizen and its members nationwide, thank you for the opportunity to testify on the issue of China's admission to the World Trade Organization (WTO) and related matters regarding Normal Trade Relations (NTR) status for China.

My name is Lori Wallach. I am the director of Public Citizen's Global Trade Watch. Public Citizen is a consumer advocacy group founded in 1971 by Ralph Nader. My testimony today is also endorsed by the Citizens Trade Campaign of which Public Citizen is a member group along with hundreds of other consumer, labor, religious, environmental, family farm and other citizens' groups across the country. The combined membership of the Citizens Trade Campaign member organizations is over 7 million nationwide.

Most simply, Permanent NTR for China is neither merited nor necessary.

PNTR is not merited on the basis of the Chinese government's dismal and steadily decaying record on an array of issues from human rights and weapons proliferation to meeting its international obligations or conducting fair trade. At issue with Congress' PNTR decision is really one thing: eliminating Congress' annual review of the US-China relationship under the Jackson-Vanik Amendment, which sets procedures for annual grants of NTR to non-market economies. Whether or not NTR is permanent, the US and China will continue to trade. Indeed, absent an act of Congress to change the status quo, the US would continue to provide the same basket of trade privileges to China annually that it grants its most favored trade partners. The only real question is whether Congress should give up its annual review and the related ability to determine the US trade treatment China should be granted.

The Chinese regime and US corporations seeking to relocate production to China and guarantee unconditional access for their products back into the US market seek termination of the

annual review because it shines a spotlight of scrutiny on an otherwise totally unaccountable Chinese regime. The Clinton Administration severely undercut the effectiveness of the annual review by formally delinking it from human rights and other concerns. However, before the current Administration put this tool up on the shelf, it was used effectively. The leverage created by the review combined with the specter of access to the US market being reconnected to China's human rights, non-proliferation or trade violations, is a powerful tool for change that must not be denied to future Congresses and Administrations. Yet, a core principle of the WTO is that countries may not consider other countries' human rights conduct or the conditions, such as with forced labor, under which their goods are produced in determining those countries' market access rights.

The one useful outcome of the Administration's move to delink China's trade status and human rights is that it has allowed the theory -- that greater trade links with the US and greater economic freedom will improve human rights and democracy -- to be proved to be false. Greater trade links and economic liberalization with China have not resulted in improvement in China's human rights conduct nor promoted the growth of democracy in China. In fact, the opposite has occurred. The US State Department's 2000 annual human rights report documents the worst human rights, democracy, religious freedom, and free press violations in China of any past year. Meanwhile, during this same period the US trade deficit with China exploded and now tops \$70 billion.

PNTR is also not necessary: even if Congress opposes China PNTR, US exporters still would obtain the potential trade benefits of China's WTO accession under the 1979 US-China Agreement. Because proponents of PNTR have an extremely difficult time making the human right case, given the data, they typically fall back on the argument that PNTR is necessary to avoid putting US businesses at a competitive disadvantage relative to other WTO countries if China joins the WTO.

Yet, the Agreement on Trade Relations Between the United States and China ("1979 Agreement"), which automatically renews every three years and which is the basis for billions of dollars of current US-China trade, provides US farmers and manufacturers with the *identical* benefits China must give all WTO nations if it joins the WTO. The 1979 Agreement unequivocally requires that the US and China shall grant each other any advantage, favor, privilege or immunity they grant to any other nation.¹ Thus, the major tariff cuts required if China enters the WTO apply to US goods regardless of the fate of PNTR.

The 1979 Agreement means that US exporters will obtain the same trade benefits from China's WTO entry as would businesses in other nations, including regarding distribution and other matters related to internal sales of imported goods. The broad Most Favored Nation (MFN) requirement in the 1979 Agreement means that China must give the US the *same best treatment* it gives any other nation. If China enters the WTO, that best treatment will be the WTO terms China gives other nations. Thus, claims by the Administration that U.S. goods alone would miss out on the significant tariff cuts that the Administration is touting as a key result of China's WTO entry or that US businesses would still face domestic content or performance requirements are false.

¹ 1979 Agreement, Article II.

The plain language of the 1979 Agreement invalidates the USTR's claim that distribution and other sales-related aspects of importing goods are not covered. The actual language of the 1979 Agreement requires China to grant the U.S. Any advantage, favor, privilege...² All laws, regulations and requirements affecting all aspects of internal sale, purchase, transportation, distribution or use of imported goods.³

The U.S. could have the best of both worlds: tariff cuts and other trade benefits required if China enters the WTO and effective enforcement via US measures such as speedier domestic surge-protection, anti-dumping laws, and Section 301 which WTO forbids.

The Clinton Administration says that if Congress does not grant PNTR, it will file at the WTO for a non-application⁴ with China - meaning the US and China won't have a full WTO relationship. PNTR advocates and opponents agree if this occurs, WTO dispute resolution will not apply between the US and China. However, opponents see the ability to use speedy and effective US unilateral trade enforcement tools as a *benefit* of maintaining annual MFN. If the U.S. does grant PNTR it will be bound to only using WTO dispute resolution to enforce China's trade commitments. As we have seen with assorted US-EU WTO fights, WTO dispute resolution takes at least two years and ultimately relies on something entirely missing in China: commitment to the rule of law.

The US has nothing to lose by taking a trust but verify⁵ approach to China trade by maintaining US enforcement tools forbidden by the WTO regarding China while reviewing whether China follows its WTO commitments. The November 1999 US-China WTO deal is not a separate trade agreement, but rather the US contribution to what will be the WTO terms China gives to all 136 WTO Members. US negotiators built on what the previous countries negotiating with China had obtained, and countries still negotiating, such as the European Union, will build on what the US obtained. The best commitments that are obtained in all of these bilateral talks will be multilateralized and become the terms of China's WTO accession, along with some issues to be negotiated in Geneva. (This includes how the state-owned sector will be treated and rules on subsidies unfinished issues noted in a recent General Accounting Office report⁶ on China-WTO, begging the question of how Congress would rush to approve PNTR without knowing the terms of China's WTO accession.) All of these concessions⁷ will be equally available to all WTO countries. The US will obtain these same concessions under the 1979 US-China Bilateral Agreement whether or not the US Congress grants China PNTR.

The US has plenty to lose by granting PNTR, including effective trade enforcement tools, the leverage of annual congressional review of China's record and WTO attacks on US laws by China. In the 21 years of US-China trade, different Administrations have declared each and every US-China trade agreement as the *First*,⁸ the *Last*,⁹ and the *Most Important*.¹⁰ Yet, China has systematically broken trade commitments to the U.S. and other countries. China has only halted violations of trade *C* and other international

² 1979 Agreement, Article II.

³ Id. at Article II (D)

⁴ GAO Report GAO/NSIAD-00-94 "China's WTO Membership"

commitments C when threatened with dire economic implications in the form of large and speedy trade sanctions. By not granting PNTR, the U.S. can take a trust but verify approach on China trade under the WTO, obtaining the WTO benefits via the 1979 Agreement and maintaining our annual review until we have evidence that China will follow WTO terms. Meanwhile, by not granting PNTR and avoiding a full WTO relationship with China, the US can also avoid challenges by China to US human rights, environmental, and other laws using WTO dispute resolution. As the past five years of WTO jurisprudence have shown, plaintiffs generally win cases at the WTO and each and every domestic environmental, health, or other public interest measure brought to the WTO has been ruled an illegal trade barrier.⁵ Thus, in addition to requiring the US to give up effective US enforcement tools, a full US-China WTO relationship would mean US laws newly would be exposed to WTO attack by China whose government has been very vocal in challenging the legitimacy of US laws and policies.

A. PNTR for China Is Not Merited

In 1994, the Clinton Administration launched a major experiment by delinking US trade treatment for China from our human rights concerns regarding China. During each year of this experiment on whether free markets lead to freedom, the US State Department has reported that human rights have deteriorated. It is time to reverse that policy and to use the enormous, if unexercised, US leverage on China. The US receives over 40% of China's exports and it is these exports that fuel the economic growth that is the only basis for legitimacy for the current Chinese regime.

The complete absence of democracy and freedom in China should give pause to what a free trade might mean to the Chinese government. In 1989, China repressed thousands of peaceful demonstrators at Tiananmen Square. Hundreds were killed or disappeared, thousands more served lengthy prison terms, and even now, nearly 250 still languish in Chinese prisons.

How will Members of Congress justify to voters back home ending review and scrutiny over a regime that has brutally repressed the most basic freedoms Congress pledges to defend while sticking its proverbial thumb into the eye of Congress time and again with its bellicose statements. The conduct of the Chinese regime during the years it has been free of effective congressional scrutiny (thanks to the delinkage policy) has resulted in tens of thousands of stories of abuse, any one of which shows how shameful it would be for Congress to give up its only tool for change.

There is no free flow of information or open press in China. China says it will permit foreign investment in Internet services in the future. Yet, in China people who use the Internet freely risk long prison sentences. Given China's free trade in Internet services commitments did not include free speech on the Internet commitments, it is very important to understand the enormous obstacles for both investors and individuals to free use of this information service and the enormous obstacles to the free flow of information in and out of China. For instance, journalist **Zhang Ji** was convicted and jailed for disseminating reactionary documents. His crime? Emailing

⁵ See Wallach and Sforza, Whose Trade Organization?: Corporate Globalization and the Erosion of Democracy, (1999) at chapter 8.

⁶ Report: China Arrests Archbishop, *Associated Press*, February 14, 2000

information on the Chinese crackdown on Falun Gong practitioners over the Internet to the US^{6,7} The international Committee to Protect Journalists reported this year that China had more reporters behind bars than any other country.

Attacks on democracy activists and journalists have escalated, with leaders and members of the Chinese Democracy party either jailed or exiled. For instance, **Gao Hongming** prominent member of the Beijing Chinese Democracy Party (CDP), was under police surveillance for eight years, including monitoring and videotaping his contacts with foreigners. The CDP is a banned opposition party because its platform includes open and free elections in China. Mr. Gao was picked up and detained in June 1999 when the Chinese government swept the country free of democracy activists to prevent any demonstrations to memorialize the ten year anniversary of Tiananmen. Weeks later he was released, only to be arrested again in August for subversion and sentenced to eight years in prison.

The Chinese government controls all religious activity within China and those who seek religious freedom are imprisoned. There are only five officially recognized religions in China, and each official faith is tightly controlled by the Chinese government. For instance, China recognizes only the Catholic Patriotic Movement as its Catholic Church. However, the Catholic Patriotic Movement is not recognized by the Vatican as a Catholic Church. Though China counts as many as 4 million official Catholics, the Vatican believes there are as many as 10 million underground Catholics. In the past year several Bishops ordained and recognized by the Vatican have been detained and a long list of priests and nuns have been imprisoned. Recently, the 80-year-old Archbishop ordained by the Pope but not recognized by China disappeared in Fuzhou in the Province of Fujian. Many people believe he has been arrested again. **Archbishop John Yang Shudao** has already spent nearly three decades in Chinese prisons; thus his health is fragile. His exact whereabouts remain unknown despite demands for information from numerous governments and the Vatican.

The official Protestant Three Self Patriotic Movement has between 10 and 15 million members, but the growing Protestant evangelical and home church movement has as many as 30 million followers. In the past year the Chinese government has conducted severe crackdowns on these Protestant groups. Protestant churches have been raided with their followers and Bibles swept up by police, and **Xu Yongze**, a prominent evangelical leader was publicly labeled a cultist. When police in Xinyang arrested 16 Christians on March 2, 2000, they also confiscated their Bibles, a typical practice. No one is certain what has happened to Mr. Xu and the others who were interred during these church raids.

The highest holy person in the Buddhist religion is the Dalai Lama, yet no picture of the Lama is allowed to be displayed anywhere in his Tibetan homeland. Indeed, many Tibetans are serving long prison terms for the crime of posting his likeness.⁸ Amnesty International reports that the hundreds of teenage girl and boy Buddhist

⁶ Report: China Arrests Archbishop, Associated Press, February 14, 2000

⁷ Attacks on the Press in 1999, Committee to Protect Journalists, March 22, 2000.

⁸ U.S. Department of State, 1999 Human Rights Report, China, February 25, 2000

monks jailed in Tibet face horrible abuse, from systematic rape to starvation. Meanwhile, the child that the Dalai Lama chose to be the Panchen Lama, the second holiest figure in the Buddhist religion, has not been seen in three years since the young child and his family were detained by the Chinese government. The Chinese government named its own Panchen Lama and installed that child shortly after disappearing the Dalai Lama's choice.

The Chinese government only allows the existence of the official Chinese government-sponsored union, a notoriously corrupt wing of the communist party known for ignoring the demands of Chinese workers. Workers for decades have tried to organize independent unions who will actually fight to clean up horrifically unsafe work places and demand living wages. Labor leaders have long been on the front lines of the fight for democracy in China. Many languished in prison or in forced labor camps after Tiananmen.

A major Chinese mining operation, Sichuan Xinkang Asbestos, is part of the Laogai prison labor camp system.⁹ Americans view the Laogai system as forced labor camps, but China calls them "education camps." At Xinkang Asbestos Mine, hundreds toil under the gun; working and living conditions contribute to the high death rate. The **Guangzhou #1 Reeducation Through Labor Camp** also is part of the Laogai prison forced-labor system. Prisoners at this facility work in a stone quarry and also assemble artificial flowers for export to the US, among other nations. The Chinese Ministry of Justice has refused US Customs officials' requests to visit this facility even though in 1992 China signed an agreement with the US on prison labor requiring such access.

Last year according to the Committee to Protect Journalists, three people who have struggled for years to establish independent unions were arrested when they created and published the *China Workers Monitor*, a journal which campaigned for workers rights. Two of these leaders are sentenced to decade-long terms. **Yue Tianxiang, Guo Xinmin, and Wang Fengshan** represent the best of the labor movement worldwide by putting their lives on the line fighting for workers rights and publicizing the conditions for Chinese workers. China's footwear industry produces 6 billion shoes a year enough for every person on earth. Many name brand sneakers are produced in plants such as the Tung Tat Garment Factory in Shilong, Dongguan province where workers toil 80 hours a week for 244 an hour making Adidas¹⁰ Until real unions are permitted in China, Chinese workers will not be paid a living wage, much less enough to afford US products

Retaining the ability to effectively pressure against such abuses would be sufficient grounds for Congress to reject PNTR and the termination of the annual review. However, to make matters even clearer, there is little to be lost and much to be gained economically if Congress rejects PNTR.

B. PNTR for China Is Not Necessary

There have been numerous misconceptions as well as a certain amount of outright mendacity regarding China WTO accession and Congress's role. Given I am joined on this panel by Harry Wu, a person better qualified than I to explain why granting China permanent MFN is a terrible idea, I will now shift my focus

⁹A Rare Insight into China's Laogai Economy: Dun & Bradstreet Directory Lists Forced Labor Camps, Laogai Research Foundation, 1998.

¹⁰Behind the Label "Made in China" National Labor Committee, 1998.

onto clarifying *what* Congress=role really is on this matter **C** and Congress= options. I will start by clearing up some myths and misconceptions:

Proponents of granting China permanent NTR suggest that China could not enter the WTO *unless* the U.S. Congress granted it permanent NTR status. Contradicting their first point, proponents of permanent China NTR also claim that if China entered the WTO and the US Congress does not pass permanent NTR for China, US businesses would be excluded from whatever trade benefits China grants other countries when it joins. Both claims are entirely false. However, given that numerous pro-PNTR experts and the Chinese government have both dispelled the first notion **C** that China's WTO admission has anything to do with Congress= P vote **C** I will not focus on it.

Recently, the Clinton Administration has intensified its campaign of misinformation about the second myth, the implications for US business if China does enter the WTO and Congress refuses to grant China PNTR. For instance, in late March the Administration widely released to Congress, the press and public a USTR memo that arbitrarily reinterprets our existing array of commercial bilateral agreements with China. In the name of arguing why Congress must approve PNTR, this new USTR analysis reinterprets existing US-China agreements to be meaningless while arguing that all US-China trade problems would be solved by passage of PNTR. The new position contrasts sharply with past Clinton Administration characterizations, on the front pages of the US national press, touting the very same US-China bilaterals as providing unprecedented US market access to China and as tremendous breakthroughs in US-China relations.

In addition to conflicting with past Administration pronouncements, these highly restrictive reinterpretations of existing US-China commercial commitments have no basis in law.

As well, this *analysis* puts the short term political goal of convincing Congress there is urgent need to grant China Permanent NTR ahead of US economic interests. When Congress rejects PNTR, it is the 1979 Agreement and the other bilaterals on which USTR will need to rely to obtain trade benefits for US business. Indeed, Chinese trade officials could employ the USTR memo to try to undercut the clear language of the 1979 Agreement.

The 1979 Agreement, as was revealed in a March 1, 2000 legal memorandum by Columbia Law School Professor Mark Barenberg, would provide US businesses with the trade benefits China must provide WTO countries if it accedes to that body. **Thus, even if Congress opposes China PNTR, US exporters would obtain the potential benefits China must provide other nations if it enters the WTO while retaining the effective U.S. trade enforcement mechanisms forbidden under the WTO, such as Section 301.**

Clarifying this information is vital because it shows that Congress has an array of options regarding China's trade status that can provide U.S. economic interests with any potential benefits of China's WTO admission while maintaining a meaningful Congressional oversight role in US-China commercial relations.

1. **The 1979 Agreement Provides US Farmers and Manufacturers Seeking to Export to China with the Tariff Cuts and Distribution and Marketing Rights for Their Products Which WTO Members Obtain if China Enters the WTO Regardless of What Congress Decides on PNTR.**

The 1979 US-China bilateral agreement is unequivocal in requiring that the US and China shall grant each other any advantage, favor, privilege or immunity they grant like products originating in or destined for any other country or region¹¹. This language describes a broad reciprocal grant of Most Favored Nation (MFN)¹² treatment between the US and China.

If this broad coverage were not clear on its face, the general Article II language in the 1979 Agreement is followed by explicit extension of such MFN coverage to all matters regarding:¹³

- C tariffs, duties and charges of any kind; (Article II(A))
- C **All laws, regulations and requirements affecting all aspects of internal sale, purchase, transportation, distribution or use of imported goods;** (Article II (D))
- C customs clearance, transit, warehousing; (Article II (B))
- C taxes and other internal charges levied directly or indirectly; (Article II(C))
- C administrative formalities for import and export licenses. (Article II (E))

Most simply, the terms of the 1979 Agreement mean that China must give to US goods the best treatment it provides to any other nation's goods - including in all matters regarding...the above list of sales and distribution-related aspects. The plain language of the 1979 Agreement proves false the Administration and business claims that distribution and other sales-related aspects of importing goods to China are not covered by the 1979 Agreement.

As well, the Administration continues to be ambivalent when asked whether all WTO-required tariff cuts would be available to US exporters regardless of passage of PNTR. The answer to that inquiry is yes, unequivocally US goods would obtain those steep tariff cuts which the USTR has touted and which China would be required to make if it enters the WTO. Article II(A) of the 1979 Agreement explicitly guarantees these tariff cuts for US goods regardless of what Congress decides about PNTR for China.

2. **The November 1999 US-China Deal on Terms for China's WTO Accession Is Not a Free-Standing Trade Agreement, and the Potential Benefits of that Deal Will Not be Lost if Congress Rejects PNTR**

¹¹ 1979 Agreement, Article II, chapeau.

¹² The term Most Favored Nation comes from the text of the GATT, is used throughout the WTO and appears repeatedly in the 1979 Agreement. MFN refers to a concept under which a country commits to give the best trade treatment it provides to any trade partner to all trade partners with whom it has a MFN commitment. In the US, the statute providing annual grants of MFN treatment to non-market economies was amended to replace the term MFN with Normal Trade Relations.

¹³ 1979 Agreement, Article II, chapeau.

Many in Congress have been confused by the Administration's focus on the November 1999 US-China deal about the terms for China's WTO accession. That deal is not a free-standing US-China trade agreement, the benefits of which will be lost if the US Congress does not take action.

Rather, the process by which any new country enters the WTO includes a series of bilateral negotiations with key WTO countries, the results of which are then combined to form one multilateral protocol which sets the terms for the new country's accession to the WTO.¹⁴ US negotiators built on the commitments obtained by countries which had previously completed bilateral talks on WTO terms with China. Countries still negotiating with China will build off of what the US obtained. For instance, one major sticking point in the on-going European Union (EU)-China talks about China's WTO terms is that the EU seeks even better access for automobiles into the Chinese market than the US deal achieved. If the EU obtains the improved commitments from China, the US will also obtain those benefits as they will be multilateralized into China's overall WTO terms along with the best of the commitments that the US and other countries obtained in their bilaterals.

The 1979 Agreement's MFN requirements mean that China must give US goods the best treatment it provides to any other nation's goods - this treatment will be the totality of the WTO package once all of the bilaterals, including the US-China November 1999 deal, are multilateralized.

Currently, China's most favored treatment (now provided to the US and China's other trade partners) includes higher tariffs than the WTO permits and assorted distribution and regulatory restrictions forbidden by WTO rules. When China enters the WTO, China must cut its tariffs and regulatory restrictions to meet the WTO's rules and to conform with the assorted additional commitments it has made in its bilateral talks. Whether or not the US passes PNTR, and whether or not the US and China have full WTO relations, China must grant its new most favored treatment to the U.S. under the 1979 Agreement.

Indeed, the very notion of reciprocal MFN that is the basis of the 1979 Agreement requires that *whatever and all* benefits given to any other nation must also be granted to all MFN partners. Fluidity of coverage is inherent in the MFN concept: the benefits available to any MFN partner changes as does the granting country's treatment of other nations. Thus, if China gives other countries additional freedom from internal Chinese regulations regarding distribution and marketing of imported goods whether or not this is connected to China's WTO accession US goods obtain the same treatment under the 1979 Agreement generally and explicitly under the 1979 Agreement's Article II(D) covering regulatory and issues regarding internal sale.

The notion that the US would not obtain explicit WTO benefits China grants to other countries regarding imported goods - like those removing conditions for importing goods such as local content requirements - is incorrect. The specific example presented in the USTR March 2000 memo is that US agricultural goods could be banned from China based on food safety or pest control rules that would be forbidden under WTO rules. Yet, under the 1979 Agreement, China must provide the US the *same* treatment it provides any other country. The

¹⁴ See GAO Report GAO/NSIAD-00-94 "China's WTO Membership" at 8-11 for a description of the WTO accession process.

1979 Agreement has a specific provision - Article II(D) - explicitly extending this requirement to regulatory matters related to internal sale of imported goods. Thus, if China applies the WTO's Sanitary and Phytosanitary rules, as required, to any WTO member, it must provide the same treatment to US goods. The USTR, the Administration and PNTR business boosters are relying on Congress's lack of understanding of this core aspect of MFN as a fluid state of equal treatment versus any one set specific trade benefits.

Moreover, contrary to USTR suggestions, China could not make up for the major tariff cuts by charging US goods higher internal taxes than are charged other imported goods thanks to Article II(C) of the 1979 Agreement. As well, Article II(C) prohibits taxing US goods at a higher rate than Chinese domestic goods. This specific example is only one element of another general point on which the USTR aspect of a larger point about which PNTR boosters have not been honest: national treatment for US goods in China.

NATIONAL TREATMENT: The March 2000 USTR memo declares that unless Congress approves PNTR, US goods would not receive "national treatment," which means that China could discriminate against US goods relative to domestic Chinese goods regarding regulatory matters. This is false. It is irrelevant if the 1979 Agreement does not contain *specific* language on National Treatment, as USTR knows.

Under WTO rules, China will be required to treat all of its WTO trade partners in a non-discriminatory fashion (meaning treating domestic and imported goods the same for internal taxation and regulation). As a practical matter, this means that China must apply the same set of domestic regulations to imported goods that it does to domestic goods. And, once China provides that treatment for one of its trading partners' goods, the US and its imported goods must receive the same treatment, thanks to the requirements of MFN generally and the specific application of MFN to matters such as domestic regulations in Article II(D) of the 1979 Agreement. While the concept of National Treatment is not present in the 1979 Agreement, the *results* and *benefits* of that principle -- as translated into the actual treatment US goods must be given -- are guaranteed for US goods because of the 1979 Agreement's broad MFN obligations.

3. The 1979 Agreement Provides US Companies Seeking to Export Investment and Jobs to China Investment and Service Sector Rights, but These Rights Are Being Undercut by USTR's New Declarations that these Sectors Are Excluded from the 1979 Agreement

The 1979 Agreement also contains explicit language on services and a requirement to "accord firms, companies, corporation, and trading organizations of the other party MFN treatment." ¹⁵ These provisions and the benefits they provide to US businesses are explained in a March 1, 2000 memorandum by Columbia Law School Professor Mark Barenberg. As Professor Barenberg describes, several provisions of the 1979 Agreement require that US investors and service sector firms also be provided with MFN treatment. Many benefits in the service sectors which are part of China's WTO accession - including those negotiated by the Administration in its November deal - would be covered, thus requiring China to provide equal treatment in these areas to US firms, companies, corporations and trading organizations.¹⁶

¹⁵ Article III, 1979 Agreement.

¹⁶Article III, 1979 Agreement.

Those trying to minimize the impact of the 1979 Agreement note that the language in these areas is less detailed than other elements of the 1979 Agreement. Of course, these are same sources who claim the 1979 Agreement does not cover distribution rights, even though there is explicit coverage by name of distribution and other internal sales matters. However, more generally, any commercial agreement - and certainly any commercial agreement with China - will involve disputes about what is covered and what rules apply. As the US has found in a series of WTO cases against the EU, having rules in the WTO about an issue is no guarantee of compliance with those rules.

As well, the US has other bilateral agreements with China that cover these sectors: two comprehensive 1992 and 1995 Memoranda of Understanding with China which were touted in the national press as guaranteeing massive market access for US farmers and manufacturers, the 1995 intellectual property agreement which was similarly lauded and other sectoral bilaterals. Members of Congress will recall that these agreements were lauded as providing incredible market access for US services and new rights for investors when they were signed and the results of these agreements have been touted heavily by USTR since. The specific contents of these additional, specific bilateral agreements are outside the scope of this testimony, but go to revealing the fallacy in the Administration's claims that absent PNTR, US firms would be cut out of all service sector, intellectual property, and investor rights

4. The Administration Has Pronounced an Array of New Interpretations of the 1979 US-China Agreement Which Have No Legal Basis and Which Are Contrary to US Economic Interests

In the name of passing PNTR, the Clinton Administration has gone on a mission to undercut the scope and coverage of existing US-China trade agreements. For instance, a March 9, 2000 USTR memo includes an array of limiting interpretations of the 1979 Agreement which simply have no basis in law. For instance, the USTR memo cites a highly politicized Ways and Means Committee report as its ~~A~~legal authority[@] for newly declaring that the treaty, which has been the basis for billions of dollars of US-China trade, is nothing more than a concept paper.

The USTR employs two arguments in its attempt to undercut the 1979 Agreement's coverage.

First, the USTR memo concocts an array of limitations to the clear language of the 1979 Agreement by referring to US statutes under which the 1979 Agreement was negotiated. For instance, in trying to minimize the language in Article II of the 1979 Agreement covering ~~A~~reciprocating[@] satisfactory concessions with regard to trade **and services[@]** (emphasis added), the USTR memo argues that this provision was negotiated to comply with a section of the US trade law with a more limited scope, and thus, despite the clear language in the 1979 Agreement, service sectors would not be covered after all.

Yet, even if the 1979 Agreement language was negotiated under such a provision of US law, US law does not cover China. The actual international commitment between the US and China in the 1979 Agreement is contained in the actual terms of the 1979 agreement. US law **C** whether it includes provisions that expand or limit the actual language of an international agreement **C** has no legal effect whatsoever on China.

The actual legal commitment created by the 1979 Agreement is that which is contained in the actual document which binds both parties in international law. The USTR argument to the contrary would mean, for

instance, that if China has a domestic law under which it negotiated its WTO accession agreement which includes provisions contradicting China's WTO commitments, the Chinese domestic law binds all other WTO Member countries. Under the USTR's bizarre argument, such a domestic Chinese law would control and limit any contrary terms of China's international WTO accession agreement. Obviously, this is not how international law operates.

Second, the USTR memo stretches credulity one step further in arguing that despite an absence of language in the 1979 Agreement so requiring, the 1979 Agreement's application is limited to only what is covered by the General Agreement on Tariffs and Trade (GATT). GATT was the precursor institution to the WTO, and now its provisions and jurisprudence are incorporated under the WTO. USTR employs this device argument once again to claim that the 1979 Agreement denies US exporters distribution rights and excludes services sectors, despite language in the 1979 Agreement to the contrary, because these issues were not covered by the language of the GATT.

In fact, the 1979 Agreement contains no reference to GATT or any other agreement which limits the application of its provisions. The language of the 1979 Agreement focuses on, for instance, all products originating in or destined for the US or China and requires the same standard of treatment in all matters regarding the comprehensive list of activities regarding distribution and sale of such imported goods. As noted above, the notion of MFN treatment is inherently fluid with the best treatment granted to one country flowing to all other nations with which the granting country has MFN commitments.

5. WTO Dispute Resolution Is Less Effective for the Enforcement of China Trade Commitments than the Powerful U.S. Enforcement Tools, such as Section 301, Which Are Banned By the WTO

The USTR has stated that if Congress does not grant PNTR, it will file at the WTO for non-application with China. The WTO rules permit an existing WTO Member to declare, in advance of the admission of a new Member, that full WTO terms will not apply as between those countries.¹⁷

PNTR advocates and opponents agree that if the US files for nonapplication regarding China, and thus the US and China do not have full WTO relations, then WTO dispute resolution will not apply between the US and China. PNTR boosters lament this outcome as a major limitation of relying on the 1979 Agreement.

However, many others view the ability to use speedy and effective US unilateral trade enforcement tools as a *benefit* of rejecting PNTR and avoiding a full WTO relationship with China. If the U.S. does grant PNTR it

¹⁷The nonapplication provisions are contained in Article XIII of the Agreement Establishing the WTO which updates GATT Article XXXV. The WTO requires "unconditional" Most Favored Nation status be granted between WTO Members, but is silent as to the duration of such grants. USTR chooses to interpret this provision to require PNTR and invoke non-application if Congress does not provide PNTR, however, what is actually required is an open legal question. Thus, if the Administration did not invoke nonapplication and Congress chose to remove the free emigration conditions of the Jackson-Vanik Amendment and grant China one year of *unconditional* MFN, only a WTO tribunal could judge whether or not that satisfied WTO requirements. Such a WTO ruling would require China to bring a case against the US arguing that its WTO rights were violated. However, because USTR has announced that it will file for nonapplication absent PNTR, this question does not arise.

will be bound only to use WTO dispute resolution to enforce China's trade commitments.¹⁸ WTO rules require: A When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objectives of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding. In such cases, Members shall: not make a determination to the effect that a violation has occurred... except through recourse to dispute settlement in accordance to the rules and procedures of this Understanding...¹⁹ The same constraints to use only WTO dispute resolution apply to the timing of sanctions even when the WTO finds a violation²⁰ and the amount of sanctions permitted.²¹

As we have seen with assorted US-EU WTO fights, WTO dispute resolution takes at least two years before an initial ruling is enforceable and ultimately relies on something entirely missing in China: commitment to the rule of law. The WTO enforcement system relies on countries' investment in the well-being of the multilateral trade system so that changing a domestic policy against which the WTO has ruled is given priority over the specific national interest in that policy.

Thus, if Congress rejects PNTR, all US trade laws would still be applicable to China, including US anti-dumping and surge protection measures. These laws provide for much quicker adjudication of claims. They also provide for much speedier application of trade sanctions against trade barriers.

Moreover, many of China's practices which create barriers to US trade and investment are not covered by WTO rules. Yet, even in these areas the US could not apply sanctions under US trade law if it has a full WTO relationship with China. Under WTO, Members cannot increase tariff levels above the WTO bound tariff levels as against other WTO Members except when authorized by the WTO's Dispute Resolution Body. Thus, even if the US has the right to unilaterally determine that a country has trade barriers that are outside WTO coverage, effective sanctions to pressure for their removal are not available.

The US has been trapped by the WTO's dispute resolution system before. A high profile example was the Kodak fight with Japan. When the US threatened Japan with Section 301 action for an array of private marketing pacts and informal regulations which kept US film off Japan's retail shelves, Japan accurately charged that use of a unilateral trade law such as Section 301 would violate WTO rules.²² The US backed down²³ and instead filed a WTO case on the matter. The US lost on every point it raised, with the WTO panel concluding that the conduct alleged by the US was outside the coverage of WTO rules.²⁴

¹⁸WTO Dispute Settlement Understanding Article 23.

¹⁹ Id.

²⁰ Id. at Article 23.2(b).

²¹ Id. at Article 23.2(c).

²² Martin Crutsinger, U.S. Sends Film Dispute to Global Trade Panel, AP, 6/14/96.

²³ Id.

²⁴WTO, Japan- Measures Affecting Consumer Photographic Film and Paper (WT/DS44/R), Report of the Panel, March 31, 1998.

PNTR boosters also argue that there is a benefit to the multilateral nature of WTO dispute resolution. Yet, it is hard to argue that a multilateral system in which the US is one of 136 countries provides greater leverage than the lopsided nature of the US-China bilateral relations, wherein the US accepts a lion's share - 40% - of China's exports. Moreover, either China will or will not comply with WTO rules. If China fails to do so, the injured country, for instance the US, takes a case to WTO dispute resolution and awaits the outcome of that process. If that process drags out, under WTO rules, the US could no longer take action on its own to threaten or put in place sanctions limiting those 40% of China's exports= access to the US market to force lifting of barriers. Indeed, the WTO recently ruled that the US violated WTO rules and faces sanction in the banana case against the EU because the US imposed sanctions prior to receiving WTO permission to do so.²⁵

6. **Given the US Accepts 40% of China's Exports, China Would Not Terminate the 1979 Agreement if Congress Rejects PNTR Because the 1979 Agreement Becomes China=s Only Means to US Market Access**

Finally, PNTR boosters note that Article X of the 1979 Agreement allows countries to terminate the pact at the end of its automatically renewing three-year terms. This argument is of little merit given two facts: First, WTO rules also allow any country to withdraw at any time on six months written notice.²⁶ Second, the US is China's largest export market taking more than 40% of total Chinese exports which fuel the growth which is the sole basis for the current regime's domestic legitimacy. The US send less than 1% of its exports to China. If China refused to renew the current 1979 Agreement's term, which runs into 2001, it would lose the basis for its entry into the US market. As the annual US-China trade deficit tops \$70 billion, clearly China has the least interest in terminating NTR access to the US market.

C. **WTO Rules Would Empower China to Challenge US Human Rights, Labor, and Non-Proliferation Policies**

One final technical, legal consideration about China and the WTO is the new powers and rights China would obtain as a WTO Member as against the U.S. While it is clear that the US would be forbidden from using enforcement tools such as Section 301 if Congress grants PNTR and the US and China have full WTO relations, it is also true that China could use WTO dispute resolution against an array of US laws.

Most simply, WTO rules forbid countries from banning goods made with child or forced labor and also forbid countries from treating other WTO members differently according to their human rights, weapons proliferation or other non-commercial behavior.

If the U.S. sought to use trade sanctions against China C or for that matter to grant preferential trade

²⁵ The WTO issued a preliminary ruling in early March 2000 that the US sanctions against the EU on the WTO banana case put in place on March 3, 1999, violated WTO rules which only permitted sanctions starting on April 19, 1999. US liability for this violation will be assessed in the final WTO ruling. (AWTO Rules Against US on Timing of Banana Retaliation Against EU,@Inside US Trade, March 17, 2000, p 3.

²⁶ Article XV, Agreement Establishing the WTO.

benefits to other countries to reward progress on non-commercial issues C China as a WTO member would have standing to bring the U.S. to WTO dispute resolution wherein three trade officials would decide if the U.S. action violated China's WTO rights. If not, the panel C which includes private trade attorneys and has no conflict of interest rules for judges and no outside appeal C could order the U.S. to either change the law or face trade sanctions.

The WTO rules that China could use to challenge an array of existing US human rights and other laws include:

- ! GATT Article III which requires national treatment meaning Alike products@ must be treated equally whether made by domestic manufacturers or foreign made. The past decade of GATT and WTO jurisprudence has interpreted the ban on discriminating on the basis of *where* a product is made to also forbid treating goods differently on the basis of *how* they are made. Thus, a shoe is a shoe regardless if it is coming from forced labor in a People's Liberation Army factory in China or from a union shoe craftsman cooperative in Maine.
- ! The Agreement on Government Procurement (AGP) which is one of the 18 underlying agreements enforced by the WTO, requires that no non-commercial considerations are used in choosing bids for goods and services to be purchased by governments. Obviously, directing the use of one's own tax dollars has been a significant tool of human rights activism, for instance regarding preferential procurement policies concerning South Africa's apartheid regime.

Conclusion

I will end where I began: Most simply, permanent NTR for China is neither merited nor necessary. There is little to lose by maintaining the status quo of annual NTR grants but much to be lost by granting China PNTR.